Supreme Court, U.S.
FILED
JAN 13 1997
CLERK

No. 96-491

In The

# Supreme Court of the United States

October Term, 1996

INTER-MODAL RAIL EMPLOYEES ASSOCIATION, THOMAS FRANKS, CHARLES JONES, TOMMY MARTIN, HOYT JARRARD, and ROBERT STEIN,

*Petitioners,*

*vs.*

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE TERMINAL SERVICES, INC., and IN-TERMINAL SERVICES, DIVISION OF MI-JACK PRODUCTS, INC.,

*Respondents.*

*On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit*

## BRIEF FOR PETITIONER

Richard E. Schwartz
*Lead Counsel*
James E. Parrot
RICHARD SCHWARTZ
& ASSOCIATES, LTD.
*Attorneys for Petitioners*
393 N. Euclid Ave., Ste. 300
St. Louis, Missouri 63108
(314) 454-0022

## QUESTION PRESENTED FOR REVIEW

Do allegations by employee-beneficiaries of a health and welfare benefit plan that their employer's parent company forced their employer to discharge them and to contract out their jobs to another employer in furtherance of a conspiracy to interfere with their right to receive health and welfare benefits, state a cognizable cause of action under §510 of ERISA?

## LIST OF PARTIES TO PROCEEDING

Inter-Modal Rail Employees Association, and, in the alternative, Thomas Franks, Charles Jones, Tommy Martin, Hoyt Jarrard, and Robert Stein, filed this action against The Atchison, Topeka and Santa Fe Railway Company; Santa Fe Terminal Services, Inc.; Santa Fe Pacific Corporation; and In-Terminal Services Division of Mi-Jack Products, Inc.



## TABLE OF CONTENTS

*Page*

QUESTION PRESENTED FOR REVIEW ..... i

LIST OF PARTIES TO PROCEEDING ..... ii

CITATION TO LOWER COURT OPINIONS AND ORDERS ..... 1

STATEMENT OF BASIS FOR JURISDICTION ..... 1

STATUTES INVOLVED IN THE CASE ..... 1

STATEMENT OF THE CASE ..... 2

PROCEEDINGS BELOW ..... 5

SUMMARY OF ARGUMENT ..... 8

ARGUMENT ..... 11

I. THE APPLICABLE STANDARD OF REVIEW FAVORS PETITIONER'S PLEADING ..... 11

II. THE COURT'S PRECEDENTS ON STATUTORY INTERPRETATION AND THE CONSTITUTIONAL LIMITS ON A COURT IN CONSTRUING THE INTENT OF CONGRESS MANDATE REVERSAL OF THE NINTH CIRCUIT'S OPINION ..... 12

*Contents*

*Page*

III. THE LANGUAGE OF THE STATUTE IS UNAMBIGUOUS AND PETITIONER'S CLAIM IS AN UNEMBELLISHED APPLICATION OF THE STATUTE'S PLAIN TERMS ..... 14

A. The Clear Language Of §510 Shows That It Prohibits Discharges From Employment For The Purpose Of Interfering With Health And Welfare Benefits ..... 15

B. The Interpretations Of The Congressional Intent Underlying §510 Found By Several Other Circuit Courts Of Appeals In Construing §510 Likewise Support Reversal ..... 27

IV. THE COURT'S PRECEDENTS INTERPRETING CONGRESS' PROHIBITIONS AGAINST UNLAWFUL EMPLOYMENT PRACTICES UNDER OTHER STATUTES GOVERNING LABOR AND EMPLOYMENT RELATIONS COUNSEL REVERSAL OF THE DECISION BELOW ..... 33



*Contents*

*Page*

V. THE RELIEF PROVIDED TO PETITIONER'S MEMBERS IN THIS ACTION UNDER ERISA FOR WRONGFUL DISCHARGE MUST AFFORD COMPLETE RESTITUTION TO QUALIFY AS THE "APPROPRIATE EQUITABLE RELIEF" REQUIRED BY THE STATUTE ..... 36

VI. THE DECISION BELOW AT ITS CRUX DENIES ACCESS TO JUSTICE ..... 40

CONCLUSION ..... 41

**TABLE OF CITATIONS**

**Cases Cited:**

*Adcox v. Teledyne, Inc.*,
21 F.3d 1381 (6th Cir.), *cert. denied*,
115 S.Ct. 193, 130 L.Ed.2d 126 (1995) ..... 27, 28

*Albemarle Paper Co. v. Moody*,
422 U.S. 405, 95 S.Ct. 2362,
45 L.Ed.2d 280 (1975) ..... 39

*Allied Chemical Workers v. Pittsburg Plate & Glass Co.*,
404 U.S. 157, 92 S.Ct. 383,
30 L.Ed.2d 341 (1971) ..... 34

*Contents*

*Page*

*Anderson v. Alpha Portland Indust.*,
836 F.2d 1512 (8th Cir.), *cert. denied*,
489 U.S. 1051, 109 S.Ct. 1310,
103 L.Ed.2d 579 (1989) ..... 20

*Cannon v. Univ. of Chicago*,
441 U.S. 677, 99 S.Ct. 1946,
60 L.Ed.2d 560 (1979) ..... 34

*Conkwright v. Westinghouse Elec. Corp.*,
933 F.2d 231 (4th Cir. 1991) ..... 32

*Connecticut Nat. Bank v. Germain*,
503 U.S. 249, 112 S.Ct. 1146,
117 L.Ed.2d 391 (1990) ..... 13

*Curtiss-Wright Corp. v. Schoonejongen*,
115 S.Ct. 1223, 131 L.Ed.2d 94 (1995) ..... 20

*Deeming v. American Standard, Inc.*,
905 F.2d 1124 (7th Cir. 1990) ..... 32

*Dister v. Continental Group, Inc.*,
859 F.2d 1108 (2d Cir. 1988) ..... 11

*Dole v. United Steelworkers*,
494 U.S. 26, 110 S.Ct. 929,
108 L.Ed.2d 23 (1990) ..... 12, 13

*Fitzgerald v. Codex Corp.*,
882 F.2d 586 (1st Cir. 1989) ..... 31



*Contents*

*Page*

*Fleming v. Ayers & Assoc.*,
948 F.2d 993 (6th Cir. 1991) ..... 30

*Gavalik v. Continental Can Co.*,
812 F.2d 834, (3d. Cir.), *cert. denied*,
484 U.S. 979, 108 S.Ct. 495,
98 L.Ed.2d 492 (1987) ..... 11, 19

*Golden v. Kelsey-Hayes Co.*,
73 F.3d 648 (6th Cir.), *cert. denied*,
117 S.Ct. 49, 136 L.Ed.2d 13 (1996) ..... 20

*Harsch v. Eisenberg*,
956 F.2d 651 (7th Cir.), *cert. denied*,
506 U.S. 818, 113 S.Ct. 61,
121 L.Ed.2d 29 (1993) ..... 37

*Hazen Paper Co. v. Biggins*,
507 U.S. 604, 113 S.Ct. 1701,
123 L.Ed.2d 338 (1993) ..... 18

*Heath v. Varity Corp.*,
71 F.3d 256 (7th Cir. 1995) ..... 21, 32

*Howard Johnson's, Inc. v. Hotel & Rest. Employees and Bartenders Union*,
417 U.S. 249, 94 S.Ct. 2236,
41 L.Ed.2d 46 (1974) ..... 34

*Page*

*Ingersoll-Rand v. McClendon*,
498 U.S. 133, 111 S.Ct. 478,
112 L.Ed.2d 474 (1990) ..... 6, 9, 10, 18, 25, 26, 33, 37, 40, 41

*Inter-Modal Rail Emp. Ass'n v. Atchison, Topeka*,
80 F.3d 348 (9th Cir.), *cert. granted*,
117 S.Ct. 504 (1996) ..... 1, 5-7, 15, 18, 19, 27

*Kross v. Western Electric Co.*,
701 F.2d 1238 (7th Cir. 1983) ..... 29, 30

*Lingle v. Norge Division of Magic Chef*,
486 U.S. 399, 108 S.Ct. 1877,
100 L.Ed.2d 410 (1988) ..... 35

*Local 391 v. Terry*,
494 U.S. 558, 110 S.Ct. 1339,
108 L.Ed.2d 519 (1990) ..... 39

*M.L.B. v. S.L.J.*,
No. 95-853, 65 U.S.L.W. 4035
(U.S., Dec. 16, 1996) ..... 40

*Marbury v. Madison*,
5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803) ..... 40

*Massachusetts Mutual v. Russell*,
473 U.S. 134, 105 S.Ct. 3085,
87 L.Ed.2d 961 (1985) ..... 7, 13, 16, 24



*Page*

*McDonnell Douglas Corp. v. Green*,
411 U.S. 792, 93 S.Ct. 1817,
36 L.Ed.2d 668 (1973) ..... 12

*Mertens v. Hewitt Associates*,
508 U.S. 248, 113 S.Ct. 2063,
124 L.Ed.2d 161 (1993) ..... 37, 38

*Mitchell v. Robert DeMario Jewelry, Inc.*,
361 U.S. 288, 80 S.Ct. 332,
4 L.Ed.2d 323 (1960) ..... 39

*Moskal v. United States*,
498 U.S. 103, 111 S.Ct. 461,
112 L.Ed.2d 449 (1990) ..... 12

*Owens v. Storehouse, Inc.*,
984 F.2d 394 (11th Cir. 1993) ..... 17, 28

*Pa. Dept. of Pub. Welfare v. Davenport*,
495 U.S. 552, 110 S.Ct. 2126,
109 L.Ed.2d 588 (1990) ..... 12

*Pilot Life v. Dedeaux*,
481 U.S. 41, 107 S.Ct. 1549,
95 L.Ed.2d 39 (1987) ..... 26

*Rodriguez v. Taylor*,
569 F.2d 1231 (3d. Cir.), *cert. denied*,
436 U.S. 913, 98 S.Ct. 2254,
56 L.Ed.2d 414 (1978) ..... 39

*Page*

*Romer v. Evans*,
116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) ..... 40

*Scheuer v. Rhodes*,
416 U.S. 232, 94 S.Ct. 1683,
40 L.Ed.2d 90 (1974) ..... 11, 12

*Schwartz v. Gregori*,
45 F.3d 1017 (6th Cir.), *cert. denied*,
116 S.Ct. 77, 133 L.Ed.2d 36 (1995) ..... 37, 39

*Seaman v. Arvida Realty Sales*,
985 F.2d 543 (11th Cir.), *cert. denied*,
510 U.S. 916, 114 S.Ct. 308,
126 L.Ed.2d 255 (1993) ..... 30, 31

*Shaw v. Delta Airlines, Inc.*,
463 U.S. 85, 103 S.Ct. 2890,
77 L.Ed.2d 490 (1983) ..... 16, 24

*Stiltner v. Beretta USA Corp.*,
74 F.3d 1473 (4th Cir. *en banc*), *cert. denied*,
117 S.Ct. 54, 136 L.Ed.2d 18 (1996) ..... 31, 34

*Tameny v. Atlantic Richfield Co.*,
27 Cal.3d 167, 175, 610 P.2d 1330,
164 Cal.Rptr. 839 (1980) ..... 40

*Texas Dept. of Com. Affairs v. Burdine*,
450 U.S. 248, 101 S.Ct. 1089,
67 L.Ed.2d 207 (1981) ..... 12



*Page*

*Textile Workers v. Darlington Manufacturing Co.*,
380 U.S. 263, 85 S.Ct. 994,
13 L.Ed.2d 827 (1965) ..... 34

*U.S. v. Lexington Mill*,
232 U.S. 399, 34 S.Ct. 337,
58 L.Ed 658 (1914) ..... 17

*UFCW v. Brown Group*,
116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) ..... 5, 41

*United States v. Ron Pair Enterprises, Inc.*,
489 U.S. 235, 109 S.Ct. 1026,
103 L.Ed.2d 290 (1989) ..... 12, 13

*Varity Corp. v. Howe*,
116 S.Ct. 1065, 7, 10, 12, 13, 21,
134 L.Ed.2d 130 (1996) .....25, 33, 36, 38, 40

*West v. Greyhound Corp.*,
813 F.2d 951 (9th Cir. 1987) ..... 28

*West Virginia Univ. Hosp. v. Casey*,
499 U.S. 83, 111 S.Ct. 1138,
113 L.Ed.2d 68 (1991) ..... 7, 13, 23, 33

*Page*

**Statutes Cited:**

28 U.S.C. §1254 ..... 1

28 U.S.C. §1331 ..... 2

29 U.S.C. §1002 ..... 1, 2, 9, 15, 16, 21

29 U.S.C. §1104,
ERISA§404 ..... 7, 21, 24

29 U.S.C. §1132
ERISA §502(a)(3)(B) ..... 7, 10, 22, 31, 37, 38

29 U.S.C. §1140,
ERISA §510 ..... i *et seq.*

29 U.S.C. §1144,
ERISA §514 ..... 37

29 U.S.C. §158,
National Labor Relations Act §8(a) ..... 9, 34

29 U.S.C. §160,
NLRA §10 ..... 39

29 U.S.C. §623 ..... 11

29 U.S.C. §626(c)(1) ..... 39



*Page*

42 U.S.C. §2000e ..... 11, 39

45 U.S.C. §51 ..... 4

45 U.S.C. §§231, *et seq.*,
Railroad Retirement Act of 1974 ..... 3, 4, 7

Railroad Retirement Act of 1935 1937 ..... 7

Conf. Rep. No. 93-1280, p.330-31,
93d Cong., 2d Sess., 3 Leg. Hist. 4597 ..... 19

H. Rep. No. 93-533, p.17, 93d. Cong.,
1st Sess., 2 Leg. Hist. 2364 ..... 19

H.Rep. No. 533, p.9-10, 93d Cong.,
2d Sess., *reprinted in* 2 Leg. Hist. 2356-75 ..... 30

S. Rep. No. 127, 93d Cong.,
1st Sess. at p.35 (1973), *reprinted in*
1 Leg. Hist. 621-22 ..... 19

Senate and House Reports on ERISA, *reprinted at*,
1 Leg. Hist. 621 and 2 Leg. Hist. 2364 (1976) ..... 25

Senate Floor Debates,
2 Leg. Hist. 1641, 1811,
3 Leg. Hist. 4745 ..... 19

*Contents*

*Page*

Senate Report No. 93-127,
p.14, 93d Cong., 1st Sess.,
1 Leg. Hist. 600 ..... 19

**Other Authorities Cited:**

Federal Rules of Civil Procedure, Rule 12(b)(6) ..... 5

*Webster's New Universal Unabridged Dictionary*
p. 164 (2d ed. 1983) ..... 18



## CITATION TO LOWER COURT OPINIONS AND ORDERS

Court of Appeals: *Inter-Modal Rail Emp. Ass'n v. Atchison, Topeka*, 80 F.3d 348 (9th Cir. 1996), Case No. 93-56400.

District Court: no citations, Central District of California Case No. CV-92-06623-WJR.

## STATEMENT OF BASIS FOR JURISDICTION

The Court of Appeals entered its decision on March 27, 1996. A timely Petition for Rehearing and Suggestion for Hearing En Banc was filed. The Court of Appeals ordered Defendants to respond to that Petition. On June 24, 1996, the Court of Appeals denied the Petition and rejected the Suggestion for Rehearing En Banc.

Petitioners believe that 28 U.S.C. §1254(1) confers on this Court jurisdiction to review on a writ of certiorari the judgment of the Ninth Circuit.

## STATUTES INVOLVED IN THE CASE

29 U.S.C. §1002(1): The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program ... established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits.

29 U.S.C. §1002(3): The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

29 U.S.C. §1140: It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

## STATEMENT OF THE CASE

This case presents first a constitutional issue of access to the Federal courts in the face of ERISA's comprehensive, reticulated scheme which has preempted all the relevant California state remedies; together with the issues of the proper construction of ERISA §510, the statute which created a Federal right to a remedy to replace those preempted, and the proper role of the Federal courts in statutory interpretation. Suit was filed by Inter-Modal Rail Employees Association ("IMREA") in the district court under federal question jurisdiction, 28 U.S.C. §1331. IMREA is a nonprofit mutual benefit corporation organized under California law by over 200 former employees. Its primary purposes are concerted political advocacy for workers' rights and the conduct of this litigation to advance such goals while seeking to recover lost pension and health and welfare benefits and other damages due to its members. IMREA holds the claims of its members pursuant to



assignments and powers of attorney (App. 3).[1] Once it has concluded the litigation IMREA is required by its by-laws and under the assignments and powers of attorney given to Petitioner Association by all of its members to pay over to them all benefits recovered, less stipulated attorneys' fees and litigation costs incurred.

Alternatively, the board of directors of Petitioner Association, comprised of five of these former employees, sought to be certified as class representatives of the Association's members in the event that any court might find it was not a proper party (App. 4-5). The directors and all other members of IMREA were Santa Fe Teamsters, specifically truck drivers, crane operators and cargo handlers who were involved in loading and unloading containers and trailers between railcars and trucks.

IMREA's first cause of action is under §510 of ERISA, 29 U.S.C. §1140. It alleged on behalf of its members that Respondent Atchison, Topeka & Santa Fe Railway (hereinafter "AT&SF" or "Santa Fe"), acting through its wholly owned subsidiary Respondent Santa Fe Terminal Services (hereinafter "SFTS" or collectively with AT&SF as "Respondents Santa Fe") and in conspiracy with Respondent In-Terminal Services Division (hereinafter "ITS"), interfered with these employees' rights to receive benefits under the Railroad Retirement Act (RRA) of 1974, 45 U.S.C. §§231, *et seq.*, and under the Teamsters Union pension and health and welfare plans (App. 10-13). IMREA also filed a claim on behalf of its members for damages under the Federal Employers Liability

---

[1]All citations to the record before the appeals court are made as "App." Petitioner attached its Complaint to the petition for certiorari at Appendix IV.

Act (FELA), 45 U.S.C. §51, *et seq.* (App. 13-17). The court of appeals remanded this claim for further consideration on its suitability for class-action treatment.

Petitioner alleged that Respondents Santa Fe developed a scheme whereby AT&SF withdrew its so-called "contract" to perform inter-modal services at its Los Angeles railyard from its wholly owned subsidiary, Respondent SFTS which had been found to be a "railroad" employer under the RRA of 1974. In fact, AT&SF never before had used a contract between itself as parent and any subsidiary for performance of the inter-modal work. Less than two months after making this "new" contract, AT&SF canceled the contract and opened the work for "competitive bidding." Petitioner alleged that prior to its members' discharge Respondents conspired to "award" the contract to ITS with the understanding that ITS would reduce the amount of employee benefits payable for the railyard work (App. 9-11).

Respondents Santa Fe thus replaced themselves with Respondent ITS, a non-railroad employer, which then performed the same exact inter-modal work at the Santa Fe railyard using the same Santa Fe equipment and vehicles after hiring former Santa Fe employees who had been terminated the day before. Under their scheme, Respondents Santa Fe discharged all of the subsidiary's "railroad" employees, including the members of IMREA. The Association alleged that the purpose of this plan was illegal and violated ERISA since it was formulated and implemented with the specific intent to interfere with and deprive IMREA's members of their rights to receive pension benefits under the RRA of 1974 and to receive ERISA-protected retirement and health and welfare benefits under multi-employer plans of the Teamsters' Union (App. 6-13). Santa Fe's intent to escape payment of employee benefits, including contributions required by the Railroad



Retirement Board for "railroad" employees, was explicitly documented in a sworn declaration made by the president of the Santa Fe subsidiary (App. 59-62) (also attached to the petition for certiorari at Appendix V).

After AT&SF and SFTS discharged Petitioner's members for the purpose of interfering *inter alia* with their rights to receive health and welfare and retirement benefits, ITS rehired many but not all of the Santa Fe employees to do the same work at the same place with the same equipment, but those who remained were required to work for far lesser levels of employment benefits (App. 9-11).

## PROCEEDINGS BELOW

The district court granted Respondents' motion to dismiss Petitioner's complaint under Rule 12(b)(6) against each and every claim under §510 of ERISA for interference with the various employee benefits (App. 28-29). No Respondent filed an answer in the district court, and no party conducted discovery.

The *per curiam* opinion of a panel of the court of appeals first held that IMREA lacked standing to bring suit on the ERISA and FELA claims on its members' behalf. The court reasoned that "to establish the individualized damages sought in both the ERISA and FELA claims, each employee member would have to participate in the lawsuit." 80 F.3d 348, 350 (9th Cir.), *cert. granted*, 117 S.Ct. 504 (1996). This decision, of course, was made without the benefit of the Court's magisterial decision on associational standing, *UFCW v. Brown Group*, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996), entered shortly afterwards. The appeals court *sua sponte* had raised for the first time in its opinion any issue about the associational standing of IMREA. No Respondent had argued in the district court or at

the court of appeals that IMREA lacked associational standing. Thus, Petitioner never had an opportunity to present its constitutional views about the standing determination, i.e., that denying IMREA associational standing infringed on the members' rights of free association, speech, and petition, or about the other considerations which favored standing. This Court did not grant certiorari to examine this issue.

The appeals court reversed the district court's dismissal of the §510 claim against each Defendant for conspiracy to interfere with the employees' Teamster pension benefits. The Ninth Circuit found that "Plaintiffs clearly stated a claim under section 510 of ERISA, which 'protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting.'" 80 F.3d at 350-51, quoting *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 143, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). The Ninth Circuit also rejected Respondent In-Terminal Services' "argument that §510 does not support a cause of action against a non-employer for conspiring with an employer to interfere with ERISA-protected benefits." 80 F.3d at 350 n.5. No Respondent filed a cross-petition for certiorari on either of these issues.

The Ninth Circuit did, however, uphold the dismissal of the claims for interference with RRA pension benefits and with Teamster welfare health insurance benefits. *Id.* at 351-52. The appeals court found that, under its own decisions, claims under §510 for interference with the right to receive health and welfare benefits were not cognizable under ERISA since those benefits did not vest. *Id.* at 351. This was the point upon which the Court granted IMREA's petition for certiorari. Employees, it was rationalized, thus have no present right to receive such benefits. *Id.* The panel also rationalized that an employer may unilaterally amend or eliminate health and welfare insurance plans. *Id.* The appeals court recognized that its holding



conflicted with decisions of the Seventh and Eleventh Circuits. *Id.* at 351, n.6. Furthermore, the appeals court's opinion on this issue failed to consider this Court's decision in *Varity Corp. v. Howe*, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996), rendered shortly before this decision was announced. *Varity* upheld a claim under §404 of ERISA, 29 U.S.C. §1104, for breach of fiduciary duties by an employer who devised and implemented a scheme whereby its employees would transfer their employment to a new corporation, based on the employer's promises that the transfer would not affect their insurance benefits. In fact, that employer knew its new corporation would not remain in business because it was saddled with debt. The new corporation failed and the transferring employees lost all their health and welfare benefits. The Court held that §502(a)(3) of ERISA, 29 U.S.C. §1132(a)(3), authorized suits for equitable relief by each individual affected by the breaches of fiduciary duties. *Id.* at 1075-79.

In rejecting this Petitioner's claim under ERISA for interference with the right to receive benefits mandated by the RRA of 1974, the Ninth Circuit held that Congress "inadvertent[ly] fail[ed]" to include the 1974 RRA within the exemption from regulation for any "government plan." *Id.* at 351. Congress defined "government plan" in §3(32) of ERISA "to include any plan to which the Railroad Retirement Act of 1935 or 1937 applies". Thus, the appeals court's decision conflicted squarely with the plain language of the statute. Petitioner argued that the lower court ignored controlling precedents of the Court on legislative interpretation, such as *West Virginia Univ. Hosp. v. Casey*, 499 U.S. 83, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) and *Massachusetts Mutual v. Russell*, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985). But the Court also declined to accept certiorari on this issue.

The Court granted certiorari only on Question Number Three raised by this Association's petition for writ of certiorari. The question specifically presented was,

> Do allegations by employee-beneficiaries of a health and welfare benefit plan that their employer's parent company forced their employer to discharge them and to contract out their jobs to another employer in furtherance of a conspiracy to interfere with their right to receive health and welfare benefits, state a cognizable cause of action under §510 of ERISA?[2]

## SUMMARY OF ARGUMENT

Petitioner Association has pleaded a cause of action under §510 of ERISA for interference with its members' right to receive health and welfare benefits under an employee benefit plan established as part of the collective bargaining agreement (CBA) between the Teamsters Union and various employers. Petitioner alleges that its members were wrongfully discharged from their employment with Respondents Santa Fe for the purpose of interfering with their right to receive health and welfare benefits under the CBA. Under the plain language of the statute and the persuasive Circuit court decisions, these allegations properly state a cause of action under §510 of ERISA.

---

[2]Although the main focus of this brief is upon the specific language of the statute and the particulars of the ERISA jurisprudence, Petitioner contends that this case is fundamentally about access to the courts. *See infra* Argument at VI.



The clear language of §510 of ERISA prohibits discharges or other interferences with an employee's exercise of any right or with the attainment of any right under an "employee benefit plan." Congress defined the terms plan or employee benefit plan to include both pensions and health and welfare plans. 29 U.S.C. §1002(3). Therefore, no basis exists in the statutory language for the Ninth Circuit's interpretation of §510 to not protect employees from interferences with their right to receive health and welfare benefits, as well as pension benefits.

Congress repeatedly emphasized the broad remedial purposes of ERISA. The Ninth Circuit's interpretative shrinking of the protections afforded by §510 not only ignores the plain language of the statute but also contradicts Congress' intent behind ERISA.

In *Ingersoll-Rand v. McClendon* this Court recognized that an employee fired to prevent him from vesting in a pension had a claim under §510. Employees covered by a health and welfare plan have a present "right" to receive benefits provided they are employed and suffer a loss covered by the plan. Throughout the duration of their employment under the CBA those employees have a right to make claims for health insurance benefits. Respondents can cite to nothing in the record to support a claim that they legally could have modified or terminated health and welfare coverage for the members of Petitioner Association. The other Circuits uniformly hold that adverse employment actions which have the purpose of interfering with the right to receive non-vested health and welfare benefits are actionable under §510.

This Court's cases interpreting §8(a)(3) of the National Labor Relations Act (after which Congress modeled §510 of ERISA) establish that employers cannot subcontract out work for the purpose of interfering with employees' rights to

collectively bargain and organize. That is, an employer may not subcontract out work to a nonunion employer as soon as it learns that its employees intend to unionize. Likewise, employers like the Santa Fe Respondents cannot subcontract out the work performed by the members of Petitioner Association for the purpose of denying those employees benefits payable under the CBA and federal laws (including the Railroad Retirement Act).

Employees wrongfully discharged in violation of §510 may recover not only lost plan benefits but also back pay and front pay. Those latter items of recovery qualify as "other appropriate equitable relief" under §502(a)(3)(B) of ERISA. Under all other statutes prohibiting wrongful employment actions, Congress and this Court have recognized a right to recover back and front pay. This Court in *Ingersoll-Rand v. McClendon* stated that in a §510 action for interference with the employee's ability to vest in his pension, the relief requested -- damages for future lost wages, mental anguish and punitive damages -- was "well within the power of federal courts to provide."

The broad remedial purposes of ERISA recently confirmed by the Court in *Varity Corp. v. Howe* strongly counsel in favor of recognizing that wrongfully discharged employees should, at the very least, recover their lost wages. A court cannot make whole a terminated employee merely with an award of unpaid plan benefits under §510. Such a limited view of Congress' remedial intent does injustice to the statute and the employees it was intended to protect. Full restitution must be the proper measure of damages.

At the most fundamental level this case is about the denial of access to justice. The state-law remedies of the Petitioner's members were stripped from them by Congress in



its enactments of §510. The Court's preemption decisions have confirmed that involuntary, mandatory substitution of the Federal remedy. The *per curiam* decision of a panel of the court of appeals does violence to the ancient yet still vigorous doctrine that there exists a right to a remedy for every wrong.

## ARGUMENT

### I.

### THE APPLICABLE STANDARD OF REVIEW FAVORS PETITIONER'S PLEADING

The district court granted Respondents' motion to dismiss for failure to state a claim. The standard of review to determine the legal adequacy of the Complaint is familiar. The Court gives the Complaint its broadest intendment, and construes the allegations favorably to the pleader. The Court will not uphold a dismissal for failure to state a claim unless it determines with certainty that plaintiff cannot prove any set of facts to support the claim. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The principle question before the Court is whether Petitioner alleged a *prima facie* claim for wrongful discharge under §510 of ERISA. To reach this issue the circuit courts generally have analogized to claims under Title VII, 42 U.S.C. §2000e-2, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623. The circuit courts have held that "to establish a *prima facie* case under ERISA §510, an employee must demonstrate (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which an employee may become entitled." *Gavalik v. Continental Can Co.*, 812 F.2d 834, 852 (3d. Cir.), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495, 98 L.Ed.2d 492 (1987). *See, generally, Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1112 (2d Cir. 1988).

At the pleading stage the other two steps in the Court's three-step analytical framework of shifting burdens and presumptions for wrongful discharge cases, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *Texas Dept. of Com. Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), are not implicated. *See, e.g., Scheuer v. Rhodes, supra.*

## II.

## THE COURT'S PRECEDENTS ON STATUTORY INTERPRETATION AND THE CONSTITUTIONAL LIMITS ON A COURT IN CONSTRUING THE INTENT OF CONGRESS MANDATE REVERSAL OF THE NINTH CIRCUIT'S OPINION

To resolve the question here on review, the Court must interpret §510 of ERISA and discern the intent of Congress. *Dole v. United Steelworkers*, 494 U.S. 26, 35, 110 S.Ct. 929, 108 L.Ed.2d 23 (1990). To do so, the Court begins by looking at the language of the statute. *Id.*, and *Varity*, 116 S.Ct. at 1085 (Thomas, J., dissenting) ("in every case involving construction of a statute, the starting point is the language itself") (internal quotations omitted). If Congress plainly and unambiguously has drafted a statute, the Court need look no further. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) ("where, as here, the statute's language is plain, 'the sole function of the court is to enforce it according to its terms'"). The courts have a duty to "give effect, if possible, to every clause and word of a statute." *Moskal v. United States*, 498 U.S. 103, 109-10, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990). The Court's cases "express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions of the same enactment." *Pa. Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 562, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990) and *Varity*, 116 S.Ct. at 1082 (Thomas, J., dissenting) ("courts should disfavor interpretations of statutes that render language superfluous").



Only if the statutory phrase is ambiguous should the Court look beyond the statute's language and examine the legislative history. *Ron Pair Enterprises*, 489 U.S. at 242. If the Court cannot determine Congress' intent from the legislative history, then the Court employs traditional rules of statutory construction. *Dole*, 494 U.S. at 36.

The Court is bound to recognize and effectuate Congress' intent where it is clear from the words of the statute. Courts must presume that "a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1990). Such is the case here. Congress spoke plainly, but the opinion below turned a deaf ear to its plain language.

The courts are not permitted to assume that Congress inadvertently omitted a particular portion of a statute. *Massachusetts Mutual*, 473 U.S. at 143 (finding the "assumption of an inadvertent omission" in ERISA "especially suspect"), *cited in Varity*, 116 S.Ct. at 1082 (Thomas, J., dissenting). And courts may not interfere with the language Congress chose by supplying omitted phrases. *West Virg. Univ. Hosp.*, 499 U.S. at 101 ("what [respondent] asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions [in a statute] transcends the judicial function") (quoting Brandeis, J.).

## III.

## THE LANGUAGE OF THE STATUTE IS UNAMBIGUOUS AND PETITIONER'S CLAIM IS AN UNEMBELLISHED APPLICATION OF THE STATUTE'S PLAIN TERMS

Section 510 of ERISA, 29 U.S.C. §1140, reads exactly as follows:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

29 U.S.C. §1140. In light of the Congressional definitions of the terms "employee benefit plan" and "plan" to include health and welfare plans, discussed *infra*, the conduct prohibited by the terms of §510 seems quite obvious, or, at a minimum, not so murky as to serve as a breeding ground for any mysteries about intent.

Petitioner submits that its claims and those of its members present a straightforward application of §510. By its own terms the statute prohibits firing employees for exercising plan rights or to prevent employees from "attain[ing]" rights under a plan. In its Complaint, Petitioner alleges that



Respondents conspired to discharge its members from the employment with Respondent SFTS for the purpose of lowering the amount of health and welfare and retirement benefits that they would receive. By its clear terms set out above §510 of ERISA prohibits —

> "any person" from taking various actions,
>
> including the "discharge" of a "participant,"
>
> either for "exercising any right under the provision of an employee benefit plan," or
>
> "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan."

### A. The Clear Language Of §510 Shows That It Prohibits Discharges From Employment For The Purpose Of Interfering With Health And Welfare Benefits

The Ninth Circuit found that despite the broad wording of §510 it did not apply to discharging employees for the purpose of interfering with the attainment of benefits under a health and welfare insurance plan since those benefits are not vested. 80 F.3d at 351. The statute does not contain any such limitation. Should it have desired to do so, Congress could have limited §510 to interferences with benefits that had vested or would vest, such as pension plans.[3] Instead, Congress chose to draft §510 with specific words to prohibit interferences with

---

[3]Congress defined in §3(A) of ERISA, 29 U.S.C. §1002(2)(A), the terms "employee pension plans" and "pension plans".

any "employee benefit plan" or "plan." Congress defined employee benefit plan and plan to include:

> an employee welfare plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

ERISA §3(3), 29 U.S.C. §1002(3). *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983).[4] To rationalize the Ninth Circuit's conclusion, this Court would have to decide to supply an "omission" into the statute. I.e., the Court would have to legislate in the missing language limiting interference actions to employers' interferences with pension benefits only. Courts do injustice to the separation of powers set out in Articles I and III of the Constitution by impermissibly acting as a super-legislature when supplying terms to limit the reach or scope of a broadly worded remedial statute. This Court has never done so. Indeed, the Court has stated that it is "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." *Massachusetts Mutual*, 473 U.S. at 147.

Moreover, the language of §510 makes clear that Congress intended to prohibit interferences with vested and non-vested

---

[4]In pertinent part, Congress defined the terms "employee welfare benefit plan" and "welfare plan" to include "any plan, fund, or program ... established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits." ERISA §3(1), 29 U.S.C. §1002(1).



benefits. The statute first proscribes actions against a participant or beneficiary "for exercising any right to which he is entitled" under a plan. The plain language of that phrase means rights which the participant presently enjoys. For example, injured employees have a present contractual right to make claims for health insurance benefits under their employee welfare benefit plan. *See Owens v. Storehouse, Inc.*, 984 F.2d 394, 398 (11th Cir. 1993) ("employer may contractually bind itself to provide fixed medical benefits"). Likewise, participants presently vested in a pension plan have a right to claim pension benefits provided they meet the eligibility requirements. By virtue of their status as employees under their union contract up till the day of their discharge, Petitioner's members had the right to make hospital and other healthcare benefits claims under the Teamsters' health and welfare plan to which their employer was a signatory.

Section 510 in its second clause expressly prohibits acts undertaken "for the purpose of interfering with the *attainment* of any right to which such participant *may become entitled* under the plan" (emphasis added) as well as the acts prohibited by the first clause. The highlighted portions of the second clause permit no reasonable inference other than that the statute prohibits interference with the attainment of future employee benefits, particularly when read together with the first clause which speaks of benefits in the present tense.[5] Employees

---

[5]In another context, this Court has indicated that the word "may" means "contingency or liability, or possibility or probability". *U.S. v. Lexington Mill*, 232 U.S. 399, 411, 34 S.Ct. 337, 58 L.Ed. 658 (1914). Webster's defines the word "become", in one of its meanings, as "to pass from one state to another; to enter into some state or condition, by a change from another state or condition, or by assuming or receiving new properties or qualities, additional matter, or a

covered by a collective bargaining agreement ("CBA") which has a specific termination date possess an expectancy (contractual right) to make claims for health and welfare benefits, at least for the duration of their employment under the CBA, when they or their family members suffer a covered injury. Here, the CBA would not have expired for another full year, until March 31, 1991. Petitioner's members were discharged on March 31, 1990. Prior to their discharge, these employees had a future right to "attain" health and welfare benefits, that is, to make claims under those plans if they or their family suffered a covered injury, at least until March 31, 1991. Moreover, the Ninth Circuit's focus upon "vested" benefits as the only ones protected, 80 F.3d at 350-51, is patently contradicted by the plain language of the second clause of §510 with its usage of such future-oriented words as "attainment" and "may become entitled".

Neither elemental logic nor the history of this legislation nor the experience of 20-plus years of employers and employees operating under this law permits a distinction between discharges which prevent pension benefits from vesting and discharges that prevent employees from making claims for health and welfare benefits under a CBA. An employee who does not yet qualify because of years of service and age for vested status in his/her pension does not have a present "right" to make a claim for pension benefits. In *Ingersoll-Rand* this Court found that "[b]y its terms, §510 protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting." 498 U.S. at 143. *See also Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (same). As best we can discern,

---

new character..., to come into being". *Webster's New Universal Unabridged Dictionary* p. 164 (2d ed. 1983).



nowhere in the legislative history of ERISA did Congress indicate that it desired to limit the remedial scope of §510 to interferences with the right to receive or attain pension benefits that will vest at some date, but simultaneously to exclude future health benefits. But our National legislature did specifically state that §510 will prevent an employer from discharging an employee "to interfere with attainment of vested benefits or other rights under the bill...." *See Gavalik*, 812 F.2d at 852, n.32, *citing* S. Rep. No. 127, 93d Cong., 1st Sess. at p.35 (1973), *reprinted in* 1 Legislative History of the Employment Retirement Income Security Act of 1974 (Senate Committee Print, hereinafter "Leg. Hist.") at 621-22, and Senate Floor Debates, 2 Leg. Hist. at 1641 and 1811, 3 Leg. Hist. at 4745. Chief Judge Higginbotham in *Gavalik* wrote that a broad protective purpose for §510 "is supported by the legislative history which envisions preventive, as well as corrective, purposes of the provision." *Id.* at 856. Absolutely nothing in the legislative record suggests that Congress intended the language of §510 to permit an employer to discharge employees who enjoyed a contractual right to obtain health and welfare benefits for a defined period in order to force them to accept lower levels of health and welfare benefits.[6] So the Ninth Circuit's artificial distinction between health and welfare benefits and pensions, 80 F.3d at 350-51, is a judicially-created anomaly at variance with the plain language of the statute and the obvious intent of Congress.

---

[6]Senate Report No. 93-127, p.14, 93d Cong., 1st Sess., broadly states that "no person can interfere with or discriminate against a participant with respect to rights and privileges which such person is entitled to under the plan, Act or the WPPDA." 1 Leg. Hist. at 600. *See also* H. Rep. No. 93-533, p.17, 93d. Cong., 1st Sess., 2 Leg. Hist. at 2364 and Conf. Rep. No. 93-1280, p.330-31, 93d Cong., 2d Sess., 3 Leg. Hist. at 4597.

Respondents may answer that because ERISA does not "generally" limit an employer's ability to modify or terminate employee health insurance benefits, *see Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223, 1228, 131 L.Ed.2d 94 (1995), an employer can fire its employees to achieve the same result. If one were to suppose that the Ninth Circuit tacitly has adopted the automaticity of this misleading syllogism, at least one could discern some intellectual principle underlying its decision. Petitioner respectfully contends that the panel's logic was flawed. Congress has spoken cogently and plainly to the contrary. Petitioner recognizes that ERISA does not limit an employer's ability to modify or terminate employee health insurance.[7] But in light of Congress' clear prohibition in §510 against an employer terminating its employees to achieve a different level of health and welfare benefits, the inescapable resolution of the seeming paradox must be that the right to change (or even to end) benefits does not extend to the freedom to engage in prohibited employment practices against

[7]*Curtiss-Wright* does not hold that employers may ignore contractual limitations on their ability to modify or terminate health and welfare benefits. Indeed, some of the circuit courts of appeal have recognized that employers and employees, usually through union representation, may agree that the employer cannot modify health and welfare benefits for the duration of the CBA, thus "vesting" such benefits for that time period. *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 655 (6th Cir.), *cert. denied*, 117 S.Ct. 49, 136 L.Ed.2d 13 (1996) and *Anderson v. Alpha Portland Indust.*, 836 F.2d 1512, 1516-17 (8th Cir.), *cert. denied*, 489 U.S. 1051, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989) (noting that Congress took a "neutral position" on the issue of welfare benefit vesting, and that "we must determine whether 'the parties intended [that] retirees' benefits would be vested and not tied to the agreement which created them'").



employees to achieve such a change. It is one thing to say an employer can modify or terminate an employee health insurance plan. But it would be wholly an unprincipled excursion to find that Congress intended that employers have freedom to terminate employees in order to achieve lower health and welfare benefits.[8]

This Court has had little occasion to interpret §510. Petitioner submits the *leitmotif* must be access to the courts to remedy unjust employment actions taken to interfere with plan benefits. In the context of a breach of fiduciary duty claim under §404, the Court held last term that an employer and its controlling parent corporation violated fiduciary duties by lying to their employees about the financial health of a new corporation and the safety of their health insurance benefits for the purpose of inducing the employees to transfer to the new corporation. *Varity Corp.*, 116 S.Ct. at 1068-69. At the time they made those misrepresentations, the employer there knew that the new corporation would fail and that its employees

[8]In *Heath v. Varity Corp.*, 71 F.3d 256, 258 (7th Cir. 1995), the court found no real contradiction between an employer's freedom to modify health and welfare benefits not contractually guaranteed for a specific term and §510's prohibition against discharges to effectuate that end: "That employers won a battle and secured the right to modify plans, while employees prevailed in a different skirmish and secured the right to qualify for benefits under existing plans, shows no more than that each side could claim some victories. It upsets the legislative balance to push the outcome farther in either direction." The circuit court held that an employee, already vested for future retirement benefits, could sue under §510 for his employer having discharged him to prevent him from obtaining eligibility for early retirement benefits (nonvested).

would lose both their jobs and their health insurance benefits. Just one year after the employer had fraudulently induced its employees' transfer, the new company failed and the employees lost their health insurance benefits and jobs. *Id.* *See also id.* at 1074: "[t]o participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense, is not to act solely in the interest of the participants and beneficiaries". The majority of the Justices of this Court in *Varity* broadly interpreted ERISA's remedial section to provide wronged employees with a direct remedy under that statute when their employer bilked them of welfare and health benefits. The Court found that

> ERISA's basic purposes favor a reading of the third subsection [§1132(a)(3)] that provides the plaintiffs with a remedy. The statute itself says that it seeks "to protect ... the interests of participants ... and ... beneficiaries ... by establishing standards of conduct, responsibility, and obligation for fiduciaries ... and ... providing for appropriate remedies ... and *ready access to the Federal courts*".

*Id.* at 1078 (emphasis added). The Court held that the employees' claim for individual relief existed by virtue of §502(a)(3) of ERISA, providing for the recovery of "other appropriate equitable relief," 29 U.S.C. §1132(a)(3).[9] But under the circuit court's *per curiam* interpretation of ERISA, employees have no access to a Federal court to obtain a remedy

---

[9]The district court in *Varity* had ordered that the employees be reinstated into the Massey Ferguson health and welfare plan, and ordered payment of "certain monetary relief" that was not at issue before the Court. 116 S.Ct. at 1069.



for any wrongful interference, no matter how intentional in its origin or malicious in its impact, with their contractual right to receive health and welfare benefits set out in a CBA. That conflicts with the specific intent of ERISA as interpreted by the majority of this Court in *Varity*. Paradoxically, the circuit court's decision here also clashes with the motivating principles of the dissenting justices in *Varity* who adhered to the magisterial principles of Justice Scalia in *West Virginia University Hospitals* concerning "plain language" interpretation of Congressional intent. 116 S.Ct. at 1081-82, 1085-86 (Thomas, J., dissenting). *Varity* stands for the rule that employees may sue under ERISA for wrongful interference with the right to receive health and welfare benefits, although the Court did not precisely address there the question presented here. But the court of appeals held that such benefits are beyond the reach of an ERISA §510 interference action. The opinion below reached a perverse result as a matter of responsible public policy, and it did so for a perverse reason under principles of statutory construction. The circuit court's scanty reasoning and cavalier approach simultaneously offend the holdings and the motivating principles of both the majority and the dissent in *Varity*.

Respondents can present no principled argument for denying access to the courts for employees who sue directly under §510 for their wrongful discharge motivated by an intent to interfere with their health and welfare benefits. Under the Court's finding in *Varity* employees have a claim for breach of fiduciary duties for inducing them to transfer to a failing company when their employers' preordained benefits loss occurs a year later. Here, the employer and its co-conspirators did not even reach for the fig leaf of delaying the loss of benefits. The point is access to justice whether the affected employees seek to redeem the preempted state rights that would have been available to them under common-law trust or tort

theories. The *Varity* majority found that Congress intended to prohibit employer conduct that wrongfully interferes with the right to receive health and welfare benefits. Petitioner submits that in drafting §510 ("it shall be unlawful for any person to discharge ... a participant for exercising any right ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan") Congress plainly intended to more forcefully state its opposition to such interference than in the more generally worded prohibition against breaches of fiduciary duties in §404(a) (requiring a fiduciary to "discharge his duties with respect to a plan solely in the interests of the participants").

It requires little effort to discern valid policy reasons why Congress preferred to require that employers negotiate with their employees (or representatives) about reductions in health and welfare benefits (where a CBA guarantees payment of benefits for a specific time), or simply unilaterally reduce their workers' benefits (if no contract guaranteeing nonmodifiable benefits is in force), rather than to promote mass discharges or employers resorting to termination of their employees to achieve that result. Promoting workplace stability and job security is such a valid policy goal. So is stability in the personal lives of workers who labor for such benefits. So are, most especially, the avoidance of labor unrest and labor-market disruptions.

This Court has noted that in drafting ERISA, Congress "repeatedly emphasized [its] purpose [was] to protect contractually defined benefits." *Massachusetts Mutual*, 473 U.S. at 148 and n.16. In *Shaw*, 463 U.S. at 90, this Court described ERISA as "a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." It would hardly serve Congress' purpose and design to permit employers – such as Respondents



Santa Fe – to engage in mass discharges of their employees through sham "contracts" to force upon them lesser health and welfare benefits than those required under an existing contract.

Central to the Court's decision in *Varity* was the recognition that Congress intended ERISA to "'provide both the Secretary and participants and beneficiaries with *broad remedies* for redressing or preventing violations of [ERISA].'" 116 S.Ct. at 1078, *citing* Senate and House Reports on ERISA, *reprinted at*, 1 Leg. Hist. at 621 and 2 Leg. Hist. at 2364 (1976) (emphasis added). In *Varity* Justice Breyer posed magisterially rhetorical questions focusing on why and how the Court might find, in light of the legislative history and the language of the statute, that Congress intended to restrict access to justice or to deny to employees a remedy for employers' actions that wrongfully deprive health insurance benefits. 116 S.Ct. at 1077. The Court resoundingly found that no such limitation existed. "We are not aware of any ERISA-related purpose that denial of a remedy would serve." *Id.* at 1079. Even more so in this case, there can be found no tenable ground to hold that Congress intended to deny access to justice.

In *Ingersoll-Rand* the Court noted that ERISA

> sets various uniform standards, including rules concerning reporting, disclosure, and fiduciary responsibility, *for both pension and welfare plans*. As part of this closely integrated regulatory system Congress included various safeguards to preclude abuse and "to completely secure the rights and expectations brought into being by this landmark reform legislation" *Prominent among these safeguards* are three provisions of particular relevance to this case: ... §510, which proscribes interference with *rights protected by ERISA*.

498 U.S. at 137 (emphasis added, citations omitted). If the Court had believed that §510 did not apply to interference with health and welfare benefits it presumably would not have employed such sweeping preemption language with any qualification or reservation. *Id.* at 138-40. The Court there appropriately could have noted the existence of such a distinction limiting access in the statute. But the Court cited to the broad range of its ERISA-preemption jurisprudence, including *Pilot Life v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) without distinction as to type of benefits sought. The Court in *Ingersoll-Rand* went on to note the importance to Congress of §510: "Congress viewed this section as a crucial part of ERISA because, without it, employers would be able to circumvent the provision of promised benefits." 498 U.S. at 143 (citations omitted).

Here Petitioner alleged that, at least through the duration of the National Master Freight Agreement (NMFA), its members' employer had promised to make contributions to the Teamsters Health and Welfare Fund at certain levels (Writ Pet. App. IV at p.26a, ¶19 and p.29a, ¶35). Petitioner further alleged that, as part of their scheme to deprive the members of health and welfare (and retirement benefits), Respondents conspired to deprive them of those benefits by discharging Petitioner's members from their employment and entering a sham contract with Respondent ITS to hire the same employees to do the same work at the same location with the same equipment, but at lesser benefits levels (*id.* at p.26a-30a).[10] Thus, Petitioner

[10]Although the question of legitimate reason for the mass discharge of Petitioner's members is not before the Court at the pleading stage, the facts that Respondent ITS hired the employees of Respondents Santa Fe to do the same work at the same place with the same equipment but with significantly lesser health and welfare and pension benefits strongly suggests an illegal motive for the discharge from employment with Respondents Santa Fe.



alleged that this conspiracy was formulated and implemented for the purpose of, and did in fact circumvent the provision of promised benefits. Its allegations clearly fall under the intent of §510 as expressed by Congress and this Court.

### B. The Interpretations Of The Congressional Intent Underlying §510 Found By Several Other Circuit Courts Of Appeals In Construing §510 Likewise Support Reversal

The Ninth Circuit appears to be the only court of appeals to have held that a discharge for the purpose of interfering with the right to receive what the court of appeals deemed "non-vested" health and welfare benefits is not actionable under §510.[11] The Ninth Circuit noted that its ruling conflicted with at least two other circuits, 80 F.3d at 350 n.6. No other circuit court of appeal has arrogated to itself so much legislative power, nor

[11]Petitioner does not concede that their right to receive health and welfare benefits was unvested. It strongly contests the relevance of the Ninth Circuit's "vesting" inquiry. It contends that "vesting" in this context is an analytically unsound method of inquiry. The evidence may prove that SFTS and AT&SF had no right under the applicable CBA's to modify or terminate contributions to the health and welfare benefits enjoyed by Petitioner. In that event, the health and welfare benefits probably could be considered to have vested for the term of the CBA's. *See Adcox v. Teledyne, Inc.*, 21 F.3d 1381, 1389 (6th Cir.), *cert. denied*, 115 S.Ct. 193, 130 L.Ed.2d 126 (1995) ("'under certain circumstances,' employee welfare plan benefits may vest contractually").

gone as far as to wholly deny access to the Federal courts to a major category of §510 litigants. One can read all the circuit court decisions interpreting §510 but this one in harmony, provided one focuses on their holdings concerning access under and the intended function of §510 without addressing collateral issues. The holding of this panel is the irredeemable anomaly which must be overruled to expunge its potentially corrosive effect upon the courts, not to speak of its impact upon the general public.

The question in a §510 action is not whether the employer has a right to modify benefits levels or wholly eliminate a health and welfare plan. Rather, the proper inquiry must be, did the employer discriminate against or otherwise alter the employment relationship for the purpose of interfering with ERISA-protected employment benefits? Thus, where a legitimately motivated employer sells its business to an unrelated company, or closes its plant for *bona fide* business reasons, or modifies its health and welfare plan for legitimate economic reasons with no intent to discriminate, the prohibitions of §510 are not implicated.[12] When, however, an

---

[12]*See West v. Greyhound Corp.*, 813 F.2d 951 (9th Cir. 1987) (sale of business), *Adcox v. Teledyne, supra*, 21 F.3d 1381 (plant closing), and *Owens v. Storehouse, Inc.*, *supra*, 984 F.2d 394 (plan modification). The holding in *West* that the seller of a business was not liable under §510 for interfering with health and welfare benefits because up to the date of employment termination the employer had paid all benefits claims, 813 F.2d at 955, ignores the second part of §510, which prohibits discharges "for the purpose of interfering with *the attainment* or any right to which such participant *may become entitled* under the plan..." (emphasis added). The second holding in *West* -- that the purchaser of the business was free not to hire the former employees at the



employer discharges its employees for the purpose of interfering with health and welfare benefits, the employees may bring suit under §510. In this case, Petitioner alleged not a plan termination or modification, but rather that Respondents conspired to discharge them to avoid paying health and welfare and pension benefits at the higher level. This important distinction is crucial to construing §510 as valid in its plain terms within the context of a comprehensive, reticulated statute. Access to justice in the case of the illegally motivated conspiracy pleaded by Petitioner should be redeemed by the Court.

In *Kross v. Western Electric Co.*, 701 F.2d 1238 (7th Cir. 1983), the former employees brought a class action under §510 alleging that their employer discharged them "to avoid continuing to make payment for [their] company-provided life and medical insurance." The employer responded that it discharged the class members as part of a workforce reduction due to reduced demand for its products. *Id.* at 1239. Finding that insurance coverage for medical expenses incurred was a "right" under the insurance plans, the Seventh Circuit upheld access to the Federal courts for the employees. The *Kross* court found "no support" in the case law or ERISA's legislative history for narrowly reading §510 so that it did not cover a discharge for the purpose of interfering with insurance benefits:

---

prior level of benefits -- does not control the allegations in this case of an illegal conspiracy between the "new subcontractor" employer, Respondent ITS, and the contracting company, Respondent AT&SF. No actual statutory "conflict" is presented by the distinction between a legitimate purchaser's right to hire whomever it pleases and holding liable under §510 co-conspirators motivated by an illegal motive to reduce ERISA-protected employment benefits guaranteed under an existing CBA.

> In light of the fact that ERISA is a remedial statute to be liberally construed in favor of employee benefit fund participants, we find no support for the district court's conclusion that since [the employees] "[were] already ... participant[s] in the insurance plans, [they were] not prevented from attaining rights under the plan".

*Id.* at 1242. The *Kross* court supported its interpretation of the Congressional intent with a quote from a House Report which declared that underlying ERISA was a

> recognition of the necessity for a comprehensive legislative program dealing not only with malfeasance and maladministration in the plans, ... but also with the broad spectrum of questions such as ... plant shut downs and plan terminations....

*Id., quoting* H.Rep. No. 533, p.9-10, 93d Cong., 2d Sess., reprinted in 2 Leg. Hist. at 2356-75.

In *Seaman v. Arvida Realty Sales*, 985 F.2d 543 (11th Cir.), *cert. denied*, 510 U.S. 916, 114 S.Ct. 308, 126 L.Ed.2d 255 (1993), the employer had first requested that the employee convert her job status to that of an independent contractor so that the employer could thus eliminate the cost of providing her non-vested health insurance and contributions to a 401(k) plan. When she refused to change her status, she was fired. That court held that the employee stated a claim under §510 of ERISA.[13] The Eleventh Circuit found that

---

[13]Other circuits have upheld §510 wrongful discharge claims where the employee alleges that the termination was to prevent accrual and assertion of claims under employee health insurance plans. *Fleming v. Ayers &*



> [t]he validity of a §510 claim does not hinge upon whether the benefits involved are vested but upon the purpose of the discharge. ... [Section] 510 prohibits employers from preventing an employee from taking advantage of a plan or from applying a plan in a discriminatory manner.

*Id.* at 546-47.[14] The *Seaman* court noted that although it "may appear anomalous" to permit an employer to reduce or terminate non-vested benefits while prohibiting an employment termination to avoid paying benefits, the structure of ERISA and its history "reveals that it is the result intended by Congress." *Id.* at 546. The court reasoned that by providing participants with the right to recover "benefits due to him under the terms of the plan," §502(a)(1)(B), "Congress intended for the employer to be bound by the terms of its plan." *Id.* at 547. *See also Stiltner*, 74 F.3d at 1484 ("Congress has determined, by enacting ERISA §510, that once an employer elects to include certain benefits within its employment package, it cannot revoke them with the intent to deter employees from asserting their rights under ERISA").

---

*Assoc.*, 948 F.2d 993, 998 (6th Cir. 1991) and *Fitzgerald v. Codex Corp.*, 882 F.2d 586, 589 (1st Cir. 1989).

[14]"[T]he legislative history ... indicates that the purpose of §510's anti-retaliation provision was to prevent employers who maintain ERISA plans from using economic leverage to intimidate participants and beneficiaries under those plans from exercising their ERISA given rights to enforce the plans' terms." *Stiltner v. Beretta USA Corp.*, 74 F.3d 1473, 1489 (4th Cir. *en banc*), *cert. denied*, 117 S.Ct. 54, 136 L.Ed.2d 18 (1996) (Phillips, J., concurring and dissenting with four other judges).

In *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990), the court found that an employer's decision to officially terminate its employees at a plant closing rather than permitting them to remain on "layoff status" and thereby to accrue time to qualify for pension benefits, violated §510: "It is clear from the text of the statute, however, that §510 was designed to protect the employment relationship against actions designed to interfere with, or discriminate against, the attainment of a pension right." *See also Heath v. Varity Corp.*, *supra*, 71 F.3d 256, where the Seventh Circuit found actionable under §510 interference with non-vested benefits (early retirement for employees already vested in the pension plan) through discharge from employment.

In *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 236 (4th Cir. 1991), the court held that §510 prohibits an employer acting to prevent the accrual of additional benefits by an employee already vested. That court notably and properly rejected the vested-nonvested benefits dichotomy favored by Respondents and the Ninth Circuit:

> Surely, Congress was not limiting §510 only to those rights which a participant acquires upon vesting, or it easily could have referred to "vested rights". Similarly, the statute refers to rights to which a participant "may become entitled", which is to say that *§510 permits suits for interfering with rights not yet earned.*

*Id.* at 237 (emphasis supplied).

If Congress had enacted ERISA with any intent to exclude from actions under §510 some or any types of interference with the right to receive health and welfare benefits, or for that matter any other non-vested benefits, it could have so stated so in the comprehensive, reticulated language of the statute, or at least in the legislative history. If this Court had believed that there was any likelihood at all that health and welfare benefits were intended by Congress to be excluded from the sweep of §510, then it would appear only reasonable that the Court for Ninth or Tenth Amendment reasons would not have applied its complete preemption analysis in *Ingersoll-Rand*, *supra*, 498 U.S. at 138-40. Neither the circuit court below nor Respondents cited any provision of the statute or its history which compels such a narrow reading of its broad language. Indeed, by its plain language §510 expressly prohibits employers from discharging employees



> for exercising any right to which he is entitled under the provisions of an *employee benefit plan* ... or for the purpose of interfering with the *attainment* of any right to which such participant *may become entitled* under *the plan.*

(emphasis added). The Ninth Circuit's *per curiam* opinion thus conflicts with the clear language of the statute, the teachings of *Casey* and *Varity*, and the holdings of at least six of the other circuit courts of appeal - the First, Third, Fourth, Sixth, Seventh and Eleventh Circuits.

## IV.

## THE COURT'S PRECEDENTS INTERPRETING CONGRESS' PROHIBITIONS AGAINST UNLAWFUL EMPLOYMENT PRACTICES UNDER OTHER STATUTES GOVERNING LABOR AND EMPLOYMENT RELATIONS COUNSEL REVERSAL OF THE DECISION BELOW

In a broader labor relations context, the Court has declared the illegality of an employer subcontracting out parts of its work

or moving its business to another location ("runaway shop") for the purpose of discriminating against its employees or interfering with their rights to organize and collectively bargain.[15] Such otherwise arguably legal conduct becomes illegal because of the employer's improper motive, and such actions violate §8(a)(1) and (3) of the National Labor Relations Act (NLRA), 29 U.S.C. §158. *See Textile Workers v. Darlington Manufacturing Co.*, 380 U.S. 263, 274, 85 S.Ct. 994, 13 L.Ed.2d 827 (1965). An employer violates §8(a) of the NLRA by unilaterally changing the terms and conditions of employment, including health insurance benefits governed by existing CBA's. *See Allied Chemical Workers v. Pittsburg Plate & Glass Co.*, 404 U.S. 157, 159, 92 S.Ct. 383, 30 L.Ed.2d 341 (1971). It appears likely that such a concern may have motivated Respondents Santa Fe to construct their sham arrangement with Respondent ITS which gave rise to this case. Finally, a successor employer (even a new owner) cannot refuse to hire a predecessor's employees solely because they belonged to a union or to avoid recognition of the union. *See Howard Johnson's, Inc. v. Hotel & Rest. Employees and Bartenders Union*, 417 U.S. 249, 262 n.8, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974).

The cases cited above are all examples of how otherwise proper actions by an employer have been declared illegal by Congress, and found by the Court to result in liability because

---

[15]"The legislative history of ERISA §510 does make clear, however, that the statute was modeled on §8(a)(3) of the National Labor Relations Act (NLRA)." *Stiltner*, 74 F.3d at 1483 (citing 2 Legis. Hist. at 1775). The NLRA and cases construing it thus may guide the Court in its interpretation of §510 of ERISA. *See generally Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-701, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979).



of illegality of the underlying motivations for those employer behaviors. The analogy of such holdings to the litigation brought by Petitioner IMREA is virtually perfect. Indeed, this Petitioner's case is more compelling than one involving only an illegal motive. Respondents Santa Fe subjected these employees to the most drastic of personnel practices – discharge. Respondents because of their illegal benefit-defeating motive have chosen to engage in prohibited employment practices against this entire group of discharged employees in order to obtain quickly a result they might otherwise have achieved more slowly but legally. This focus upon an employer's conduct and motivation pervades the jurisprudence of labor relations. *See, for example, Lingle v. Norge Division of Magic Chef*, 486 U.S. 399, 108 S.Ct. 1877, 100 L.Ed.2d 410 (1988). The specifics of this employer conduct and motivation compel liability against the Respondents.

Petitioner alleged that "[a]t all times relevant hereto, defendant AT&SF exercised day-to-day management and control over the affairs of its wholly owned subsidiary, defendant SFTS" (Writ. App. IV at p.22a, ¶8). Petitioner further alleged that its members' nominal employer, SFTS, "was formed for and its sole purpose was to do the loading and unloading work" at Respondent AT&SF's Los Angeles railyard (*id.* at p.25a, ¶15). For two decades no contract existed between Respondents AT&SF and SFTS to do that work. But in an effort to "legitimize" this unlawful conspiracy a sham contract was formed between the parent and its subsidiary. Less than two months later, AT&SF "terminated" the SFTS contract and opened the work for "competitive" bidding. Respondent ITS then "underbid" SFTS by agreeing with AT&SF to substantially reduce all employment benefits, including health and welfare

and retirement benefits (*id.* at p.27a-30a).[16] After AT&SF and SFTS fired all the members of Petitioner Association, ITS rehired most of them to do the same work in the same place with the same equipment but at lower benefit levels (*id.* at p.28a, ¶29). Thus, if Petitioner can establish that AT&SF's contract with ITS was motivated by an intent to interfere with ERISA-protected benefits set out in the applicable CBA's, then its members should be held to have stated a viable claim under §510. In contrast, if the Court should fail to reverse here, the Ninth Circuit opinion will create major dissonance with the Court's precedents mentioned herein and Congress' overall scheme for labor relations conducted through collective bargaining.

## V.

## THE RELIEF PROVIDED TO PETITIONER'S MEMBERS IN THIS ACTION UNDER ERISA FOR WRONGFUL DISCHARGE MUST AFFORD COMPLETE RESTITUTION TO QUALIFY AS THE "APPROPRIATE EQUITABLE RELIEF" REQUIRED BY THE STATUTE

Fairly within the scope of the question posed in the question on which petition for certiorari was granted, and therefore properly before the Court, *Varity*, 116 S.Ct. at 1070, is the issue of the type of relief available in this action to enforce violations

---

[16]Because ITS was not a "railroad" employer, it did not have to make contributions to the Railroad Retirement Fund. That resulted in a savings to Respondent AT&SF of over $6,000 per employee per year, representing the excess amount a railroad employer contributed over a non-railroad employer's contributions to Social Security (Writ App. V at p.38a-39a).



of §510. In *Ingersoll-Rand* the Court found that in light of the broad pre-emptive force of §514 of ERISA, 29 U.S.C. §1144, an employee wrongfully discharged for the purpose of preventing him from attaining vested status for his pension benefits could find his "exclusive remedy" only under §502(a) of ERISA for violations of §510. 498 U.S. at 145. Regarding the scope of the employee's remedy, the Court held that

> there is no basis in §502(a)'s language for limiting ERISA actions to only those which seek "pension benefits". ***It is clear that the relief requested here is well within the power of federal courts to provide***.

*Id.* (emphasis added). The employee in that case did not seek lost pension benefits "but [was] instead seeking **future lost wages, mental anguish and punitive damages** as a result of the wrongful discharge". *Id.* at 136 (emphasis added). Although the Court did not directly address there the issue of available relief, its unanimous *dictum* persuaded many that a wrongfully discharged employee might recover lost wages in addition to plan benefits lost. Indeed, the availability of the six enforcement provisions of §502(a) was central to the Court's finding of preemption. *Id.* at 143-44.

Part of this question is, did Congress mean to include front pay or reinstatement and back pay within §502(a)(3)(B), which allows a participant or beneficiary to bring a civil action "to obtain other appropriate equitable relief?" The Circuits split on this issue. *Compare Schwartz v. Gregori*, 45 F.3d 1017 (6th Cir.), *cert. denied*, 116 S.Ct. 77, 133 L.Ed.2d 36 (1995) (allowing recovery of front and back pay) with *Harsch v. Eisenberg*, 956 F.2d 651 (7th Cir.), *cert. denied*, 506 U.S. 818, 113 S.Ct. 61, 121 L.Ed.2d 29 (1993). In the context of a claim for breach of fiduciary duty against a nonfiduciary, this Court held in *Mertens v. Hewitt Associates*, 508 U.S. 248, 255,

113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), that losses resulting in underfunding of a pension plan were compensatory damages, the "classic form" of legal relief, and not recoverable under §502(a)(3). *Mertens* did not address the issue at bar. Rather, the Court there interpreted §502(a)(3) within the limited context of a breach of fiduciary duty claim. Here, of course, Petitioner has brought a claim for wrongful discharge under a different statute of ERISA which Congress has deemed to be their mandatory substitute for the entire panoply of their California tort-law remedies. The four dissenting Justices in *Mertens* noted that "we have elsewhere recognized the anomaly of construing ERISA in a way that 'would afford *less* protection to employees and their beneficiaries than they enjoyed before ERISA was enacted'". 508 U.S. at 264 (White, J., dissenting). The *Mertens* dissent went on to state that "[t]he traditional 'equitable remedies' available to a trust beneficiary included compensatory damages.... This included, where necessary, the payment of a monetary award to make the victims of the breach whole." *Id.* at 266 (citations omitted).

Because §510 fundamentally prohibits discrimination in employment status and preempts all state torts for wrongful discharge related to pensions and benefits, it is only reasonable that Congress intended to provide not only corresponding Federal rights, but also analogous Federal remedies. At a minimum lost employment damages such as back pay and front pay (in lieu of reinstatement) are appropriate remedies along with recovery of lost plan benefits. This Court recognized in *Varity* that Congress intended ERISA to provide "broad remedies" to redress violations of the statute. Thus, *Varity* found §502(a)(3) to be a "catchall" relief provision that "act[s] as a safety net" for injured plan participants. 116 S.Ct. at 1078. A court cannot make whole an employee wrongfully discharged in violation of §510 by awarding only lost plan benefits. Broad restitution for lost wages and similar losses must stand as a



fundamental part of the remedy for wrongful discharge or the Federal right conferred under §510 will become a very meager substitute for the preempted state tort claims.

This conclusion also is informed by Congress' general practice in every other Federal statute prohibiting employment discrimination to provide back pay and reinstatement (or front pay) as remedies. *See, for example, Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 and n.11, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975) (interpreting §10 of the NLRA, 29 U.S.C. §160 and Title VII, 42 U.S.C. §2000e-5(g)), the Court stated that "[w]e can find here no intent to back away from the NLRA model or to denigrate in any way the status of back pay relief"), and *Rodriguez v. Taylor*, 569 F.2d 1231, 1242 (3d. Cir.), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2254, 56 L.Ed.2d 414 (1978) (interpreting the ADEA, 29 U.S.C. §626(c)(1)).

The Sixth Circuit in *Schwartz* relied on this Court's interpretation of *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960), as discussed in *Local 391 v. Terry*, 494 U.S. 558, 571, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990), for the rule that back pay awarded against an employer "to restore to the plaintiff that to which she would have enjoyed but for the employer's illegal retaliation" is restitutionary. 45 F.3d at 1022. The Sixth Circuit found the "question of front pay ... more straightforward" since "[f]ront pay is awarded only when the preferred remedy of reinstatement, indisputably an equitable remedy, is not appropriate or feasible." *Id.* at 1023, citing cases under Title VII and ADEA. Respondents here can be expected to argue that reinstatement of the members of Petitioner Association to their former positions is inappropriate. Therefore the Court needs to make clear to the district court that "appropriate equitable relief" will require making whole the victims of Respondents' ERISA-defeating conduct.

## - VI.

## THE DECISION BELOW AT ITS CRUX DENIES ACCESS TO JUSTICE

The decision below is fundamentally about access to justice and its denial. In ruling out of existence a suit under ERISA §510 for interference with health and welfare benefits, the Ninth Circuit has done violence not only to the intent of Congress and to the Court's precedents, but also to the Constitution and our founding notion of the rule of law. *See, for example, Romer v. Evans*, 116 S.Ct. 1620, 1628, 134 L.Ed.2d 855 (1996). A central principle of our constitutional tradition is the principle that the courts remain open on impartial terms to those who seek its assistance.

Yet the *per curiam* opinion by the panel below disqualified from proceeding under §510 the entire class of persons whose health and welfare benefits motivated their discharges while it conferred the right to proceed upon those fired because of their pension benefits. This classification cannot withstand any level of scrutiny. The panel totally lost sight of the point that Petitioner Association's members' remedies under state law, *see, for example, Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 175, 610 P.2d 1330, 164 Cal.Rptr. 839 (1980), were involuntarily exchanged for a federal remedy by Congress when it enacted ERISA. *Varity*, 116 S.Ct. at 1078-1079; *Ingersoll-Rand*, 498 U.S. at 133.

This right to a remedy for every wrong runs through the Court's jurisprudence as a brilliant, redeeming strand from the earliest days of our republic, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803), up till the present term,



*M.L.B. v. S.L.J.*, No. 95-853, 65 U.S.L.W. 4035, 4040 and 4043 (U.S., Dec. 16, 1996) (Kennedy, J., concurring).

The panel below dealt with this constitutional concern in as cavalier a fashion as it did with the related issue of associational standing, *Brown Group*, 116 S.Ct. at 1536, and the other issues present here.

## CONCLUSION

Justice requires that this Court reverse the Ninth Circuit's crabbed interpretation of §510 of ERISA and find that the statute prohibits interference with health and welfare benefits by wrongful discharge from employment. The decision below contravenes the language of the statute and Congress' broad remedial intent behind ERISA. Not only does it conflict with all the other circuit courts which have addressed this issue, its holding and rationale leave Petitioner and its members without access to justice to enforce either their preempted state-law rights or their ERISA-bestowed Federal rights which Congress intended to substitute for the lost state tort remedies.

Petitioner also urges the Court to expand on its decision in *Ingersoll Rand v. McClendon* to clarify that employees wrongfully discharged in violation of §510 have a right to full restitution, including front pay (or reinstatement) and back pay. The case should be reversed and remanded with the mandate to fashion broadly remedial relief to make whole the Respondents' victims.

Respectfully submitted,

RICHARD E. SCHWARTZ
*Counsel of Record*
JAMES E. PARROT
RICHARD SCHWARTZ &
ASSOCIATES, LTD.
*Attorneys for Petitioners*
300 Euclid Hall
393 North Euclid Avenue
St. Louis, Missouri 63108-1288
(314)454-0022